

TJFA, L.P., Plaintiff, vs. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Defendant.	§ § § § § § § § § §	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 353RD JUDICIAL DISTRICT
---	--	--

**BFI WASTE SYSTEMS OF NORTH AMERICA, LLC’S PROVISIONAL PETITION
IN INTERVENTION, ORIGINAL ANSWER AND COUNTERCLAIM
(SUBJECT TO THE TCEQ’S PLEA TO THE JURISDICTION)**

Pursuant to Rule 60 of the Texas Rules of Civil Procedure, and strictly subject to the TCEQ’s pending plea to the jurisdiction, BFI Waste Systems of North America, LLC (BFI) petitions to intervene as a party-defendant in this cause of action. In support of this petition, BFI would respectfully show the Court the following:

I. PARTIES

1. This suit is an administrative appeal challenging the Texas Commission on Environmental Quality’s (TCEQ’s or the Commission’s) decision to issue an amended solid waste permit (TCEQ Permit No. MSW-1447A) after a contested case hearing was held. BFI is the company to which that permit has been issued. The amended permit authorizes BFI to expand its municipal solid waste landfill facility known as the Sunset Farms Landfill located in Travis County, Texas.

2. Plaintiff TJFA, L.P. (TJFA) challenges TCEQ’s decision to issue Permit No. MSW-1447A.

3. Defendant TCEQ is the state agency responsible for the issuance of certain municipal solid waste permits, such as the one now challenged by TJFA, pursuant to Chapter 361 of the Texas Health & Safety Code.

II. THE ORIGINAL LAWSUIT AND TJFA'S LATE-SERVED PROCESS

4. TJFA sued TCEQ on or about December 1, 2009 under TEX. GOVT. CODE §2001.171 and TEX. HEALTH & SAFETY CODE §361.321 to appeal the Commission's November 4, 2009 order granting the application of BFI for issuance of Permit No. MSW-1447A in TCEQ Docket No. 2007-1774-MSW. TJFA did not serve process on the TCEQ until January 11, 2010, however, and the TCEQ has filed a plea to the jurisdiction challenging this Court's jurisdiction to hear TJFA's suit in light of the late-served process.

5. BFI agrees that, under these facts and circumstances, TCEQ's plea to the jurisdiction is meritorious and that the Court lacks jurisdiction over this matter. However, BFI is filing this provisional plea in intervention in the event that the Court concludes that it does have jurisdiction.

III. BFI'S RIGHT TO INTERVENE

6. Any person or entity with a justiciable interest may intervene to protect its rights as long as the intervention "does not delay the case or otherwise prejudice the existing litigants." *Atchley v. Spurgeon*, 964 S.W.2d 169, 174 (Tex.App.—San Antonio 1998, no pet.); *see also* TEX. R. CIV. P. 60.

7. As the holder of Permit No. MSW-1447A, the issuance of which is being challenged by TJFA, BFI has a justiciable interest in the present lawsuit. Intervention is essential to effectively protect BFI's interest. If TCEQ's decision to issue the permit is in any way affected by order of this Court, BFI's business plans to construct and operate its expanded

municipal solid waste landfill facility, as authorized by the amended permit, would be substantially delayed – resulting in significant financial losses to BFI and disruption in BFI’s services.

8. BFI’s intervention will not complicate the case by an excessive multiplication of the issues and will not cause delay or prejudice to any party.

9. All conditions precedent have been performed or have occurred.

IV. ORIGINAL ANSWER

10. BFI generally denies the allegations contained in Plaintiff’s Original Petition.

V. BFI’S COUNTERCLAIM

11. BFI files this Counterclaim against Plaintiff TJFA and alleges as follows:

Nature of BFI’s Counterclaim

12. This is a civil action by BFI against TJFA for the collection of \$6,564.42 in transcript costs that the TCEQ ordered TJFA to pay per Ordering Provision No. 3 of the Commission’s September 14, 2009 order granting Permit No. MSW-1447A to BFI, plus accrued interest.

13. In the administrative proceedings below before the Texas State Office of Administrative Hearings (SOAH) (SOAH Docket No. 582-08-2178), BFI incurred and paid \$13,128.85 in transcript costs, of which 50 percent is owed by TJFA to BFI per the Commission’s order.

14. BFI’s counterclaim is not the subject of a pending action at the present time.

15. BFI’s counterclaim is mature and owed by TJFA to BFI at the time of filing of this original answer.

16. BFI's counterclaim arose out of the same transaction or occurrence that is the subject matter of TJFA's claim in this matter.

17. BFI's counterclaim is against TJFA in the same capacity.

18. BFI's counterclaim does not require for its adjudication the presence of any third party over whom the Court cannot acquire jurisdiction.

Jurisdiction and Venue

19. BFI's counterclaim is within the jurisdiction of the Court and venue is proper.

20. BFI's counterclaim is within the jurisdictional limits of the Court.

Claim for Relief

21. TJFA is liable to BFI for payment of \$6,564.42 in transcript costs that TCEQ ordered TJFA to pay per the Commission's order awarding the amended permit and requiring TJFA to pay 50 percent of the transcription costs.

22. TJFA is also liable to BFI for payment of interest accrued on the \$6,564.42 in transcript costs that TCEQ ordered TJFA to pay.

VI. PRAYER

23. BFI requests that the parties take notice of the filing of this Provisional Petition in Intervention, Original Answer and Counterclaim.

24. Strictly subject to TCEQ's pending plea to the jurisdiction (which BFI believes is meritorious), in the event that this Court concludes that it has jurisdiction over this matter, BFI prays that the Court enter judgment affirming and upholding the TCEQ's issuance of Permit No. MSW-1447A to BFI, and grant BFI such other and further relief, both legal and equitable, to which it may show itself to be justly entitled. BFI also prays that the Court enter judgment in favor of BFI in the amount of \$6,564.42 plus accrued interest at the highest rate allowable under

law. BFI also respectfully prays that the Court enter judgment awarding BFI any and all reasonable and necessary attorneys fees and costs it incurs in this proceeding.

25. BFI respectfully prays for all other relief to which it may be entitled.

Respectfully submitted,

By: 

PAUL G. GOSELINK
Texas Bar No: 08222800

LLOYD GOSELINK ROCHELLE & TOWNSEND, P.C.
816 Congress Ave., Suite 1900
Austin, Texas 78701
Phone: (512) 322-5800
Fax: (512) 472-0532
E-mail: pgosselink@lglawfirm.com

**ATTORNEYS FOR BFI WASTE SYSTEMS OF
NORTH AMERICA, LLC**

Certificate of Service

I hereby certify that a true and correct copy of the Plea to the Jurisdiction, or, in the Alternative, Motion to Dismiss, and Original Answer of Defendant Texas Commission on Environmental Quality was served on the following counsel/parties of record by certified mail (return receipt requested), regular U.S. mail, facsimile transmission and/or hand delivery and via e-mail on February 11, 2010:

Ms. Nancy E. Olinger
Assistant Attorney General
Attorney General of Texas
Environmental Protection and Administrative Law Division
P.O. Box 12548
Austin, Texas 78711-2548
Attorneys for the Texas Commission on Environmental Quality

Mr. Erich M. Birch
Ms. Angela K. Moorman
Birch, Becker & Moorman, LLP
4601 Spicewood Springs Road
Building 4, Suite 101
Austin, Texas 78759
Attorneys for TJFA

Mr. James A. Hemphill
Graves Dougherty Hearon & Moody, PC
401 Congress Avenue, Suite 2200
Austin, Texas 78701
Attorneys for TJFA



Paul G. Gosselink